The Couple on No-one’s Lips: Allowing Perfect Imperfections in Scottish Cohabitations

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Abstract

Cohabitation is an increasingly popular family structure in modern society. In response to this change, section 28 of the Family Law (Scotland) Act 2006 was enacted to provide limited rights to cohabiting couples on the breakdown of their relationship. However, the poor drafting of the legislation reduced the effectiveness and usefulness of section 28. This paper analyses the problems in making a claim for financial provision under section 28(2)(a) and considers the impact of the recent Supreme Court judgment in Gow v Grant on such problems. Through an examination of various reform methods, recommendations will be proposed for the future of section 28(2)(a) claims. This paper contends that the Supreme Court judgment has cured various deficiencies in the drafting of the legislation and the issues that remain are ‘early days’ effects which should dissipate after section 28(2)(a), read with the Supreme Court judgment, has settled in.

1. Introduction

Scotland, in common with many other Western jurisdictions, has since the 1960s experienced relatively rapid demographic change. In response to the greater diversity of family life in Scotland, the Family Law (Scotland) Act 2006 (the ‘2006 Act’) gives some recognition to people who live together without marriage or civil partnerships and provides limited financial remedies at the end of cohabiting relationships. These provisions are not intended to accrue to cohabiting couples marriage-equivalent legal rights, or to undermine the freedom of those who have deliberately opted out of marriage or of civil partnerships. Instead, they represent a middle way between the protection offered to spouses or civil partners and none at all by recognising unmarried cohabitants and giving some protection to those who are economically vulnerable when the relationship ends.

Section 28 of the 2006 Act is the first legislative provision in Scots law to give a former cohabitant the opportunity to make a claim for financial provision from his or her former partner when the relationship ends within the parties’ lifetimes. The introduction of section 28 is a welcome addition to Scots family law, as the position

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1 Gow v Grant [2012] UKSC 29.
3 SP Bill 36-PM Family Law (Scotland) Bill [policy memorandum] Session 2 (2005), para 65.
of cohabitants prior to the 2006 Act was considered overall to be both uncertain and potentially unjust.\textsuperscript{4} However, the development of the 2006 Act was a long and gradual process which began in 1990, and in the course of that process the purpose of section 28 altered. Consequently, when it was first introduced, there was generally widespread criticism over the manner in which section 28 had been drafted.\textsuperscript{5} The omission of a guiding principle for section 28 has been a significant factor in the uncertainty over both the intended scope of the provision as well as the manner in which it should be interpreted and applied by the courts.

This article will examine the problems in making a claim under section 28(2)(a) after all the procedural matters have been satisfied.\textsuperscript{6} It will contend that the poor drafting of the legislation has been the cause of the problems encountered by both judges and practitioners in constructing and applying section 28(2)(a). This paper will also seek to determine the extent to which the UK Supreme Court (UKSC) in \textit{Gow v Grant}\textsuperscript{7} has cured some of the deficiencies in the drafting of the legislation. It will be argued that following the judgment of the Supreme Court, section 28(2)(a) is now in the position it should have been in when it was enacted if it had been drafted properly.

It will be demonstrated that it was the intention of the legislators to establish fairness as the underlying aim of section 28. The surprising omission of fairness as a guiding principle, along with the unfettered discretion afforded to the courts in determining whether an award should be made, led to inconsistent and contradictory case law. This seriously diluted the usefulness and effectiveness of a claim under section 28(2)(a). It will be argued that the UKSC judgment has established fairness as the guiding principle of section 28 and provided direction for courts to exercise their discretion. The provisions have also been broadened in order for fairness to be achieved after a full assessment of the facts and circumstances of the individual case.

However, uncertainty remains over how the courts will exercise their discretion when determining fairness and as to how to quantify a claim under section 28(2)(a). It will be demonstrated that uncertainty is inevitable over such matters in a claim where the underlying aim is fairness and based on contributions and sacrifices. The article will seek to determine whether it is possible, and indeed desirable, to reduce the current uncertainty. It will be argued that although desirable, it is difficult to achieve. Furthermore, much of the uncertainty that remains is because section 28(2)(a), read in conjunction with the UKSC judgment, has not yet had sufficient time to settle in. It is hoped that, over time, some of the


\textsuperscript{5} Kirsty Malcolm, Fiona Kendall and Dorothy Kellas, \textit{Cohabitation (2nd edn, W Green 2011)} para 1-07.

\textsuperscript{6} For coverage of the issues as they concern a claim under sections 28(2)(b) and (2)(c), the procedural matters in making a claim under section 28 and cohabitation agreements, which for reasons of space will not be considered in this paper, see Kirsty Malcolm, Fiona Kendall and Dorothy Kellas, \textit{Cohabitation (2nd edn, W Green 2011)}; For a discussion of the issues concerning the range of orders a court can make under section 28, see Jo Miles, Fran Wasoff and Enid Mordaunt, ‘Reforming Family Law – The Case of Cohabitation: ‘Things May Not Work Out As You Expect”’ (2012) 34 Journal of Social Welfare & Family Law 167.

\textsuperscript{7} \textit{Gow} (UKSC) (n 1).
current uncertainty will dissipate with increasing precedent, and a claim under section 28(2)(a) will be both an effective and useful provision for cohabitants.

This paper will be structured as follows: Part 2 will provide a definition of a cohabitant; Part 3 will examine the background of section 28, the general approach to the application of section 28(2)(a) and the achievements of section 28(2)(a) so far; Part 4 will examine the problems encountered in a claim under section 28(2)(a); Part 5 will consider the decision of the UKSC in Gow v Grant and the implications of it; and finally, in Part 6, recommendations will be made as to the future of section 28(2)(a) claims after an analysis of several reform methods.

2. Definition of a Cohabitant

Section 25(1) of the 2006 Act defines a cohabitant as either member of a couple who live or have lived together as if they were husband and wife or civil partners. That definition is supplemented by the terms of section 25(2), which lists a number of factors to which a court shall have regard when determining whether or not a person is a cohabitant, namely the length of time the couple have or had been living together, the nature of their relationship during that period and the extent and nature of any financial arrangements between them during that period.

Although this additional provision has been described as “intellectually incoherent” in that it apparently seeks to redefine the definition in section 25(1), it can be said to express the intention of the Scottish Executive to give a clear message that the legislation was intended to apply to long-term and enduring relationships. There is however, no set minimum prescribed period for the duration of cohabitant relationships because of the Scottish Executive’s concern that such a period would be ‘arbitrary, rigid and unresponsive to individual cases.’ Therefore the additional factors are likely to reinforce the idea that it is the quality of the cohabitation as a whole, as opposed to merely the length of cohabitation, which determines whether or not there is a cohabiting relationship.

3. Section 28 in Scotland

A. Development of Section 28

The consultation and discussion about cohabitation and the potential need for legal rights for cohabitants to be established began with the Scottish Law Commission (‘SLC’) Discussion Paper on The Effects of Cohabitation in Private Law in May 1990. This was followed up by the SLC Report on Family Law in 1992, which contained the foundation of the proposed reform as well as a draft Bill. The SLC submitted that there was a strong case for some limited reform of Scottish private law to enable

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8 Although spouses and civil partners can both be said to be in a cohabiting relationship, ‘cohabitants’ in this paper means people who do not cohabit with a spouse or a civil partner.
10 SP Bill 36-PM Family Law (Scotland) Bill [policy memorandum] Session 2 (2005), para 67.
certain legal difficulties faced by cohabiting couples to be overcome and to enable certain anomalies to be remedied.\textsuperscript{13} It was stated that any reform ‘should be confined to the easing of certain legal difficulties and the remedying of certain situations which are widely perceived as being harsh and unfair’.\textsuperscript{14}

It was with the need for distinction between marriage and cohabitation in mind that the SLC rejected a comprehensive system of financial provision on termination of a cohabitation comparable to the system of financial provision on divorce in the Family Law (Scotland) Act 1985 (the ‘1985 Act’).\textsuperscript{15} Instead, the SLC recommended only the adoption of the principle contained in section 9(1)(b) of the 1985 Act,\textsuperscript{16} which requires fair account to be taken of economic advantages gained by one party and economic disadvantages by the other party, within the context of a marriage. The Report stated it would be ‘unfair to let economic gains and losses arising out of contributions or sacrifices made in the course of a relationship simply lie where they fall’ and that the principle in section 9(1)(b) could be applied ‘quite readily and appropriately’ to cohabitants.\textsuperscript{17} However, the reasoning for applying this principle was not to impose on cohabitants a solution based on a particular view of marriage, but rather to give cohabitants the benefit:

\begin{quote}
[O]f a principle designed to correct imbalances arising out of the circumstances of a non-commercial relationship where the parties are quite likely to make contributions and sacrifices without counting the costs or bargaining for a return.\textsuperscript{18}
\end{quote}

Therefore, the application of section 9(1)(b) to cohabitants was intended to correct imbalances that arise from contributions or sacrifices in a relationship if it was fair to do so. Indeed, the draft Bill attached to the Report included a clause to the effect that the court should only make an award if ‘having regard to all the circumstances of the case it is fair and reasonable to make’ it.\textsuperscript{19}

The SLC also recognised the potential difficulties in quantifying a claim based on contributions or sacrifices, which could often not be valued precisely. It was submitted that, notwithstanding such difficulties, the recommended provision ‘would provide a way of awarding fair compensation, on a rough and ready

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\textsuperscript{13} An example of a possible anomaly is the situation whereby a remedy is provide under section 9(1)(b) of the Family Law (Scotland) Act 1985 for economic contributions and sacrifices made during a cohabitation which is followed by a short marriage and then divorce, but not for those made during a cohabitation of equal length and similar nature which ends without a marriage: Scottish Law Commission \textit{Family Law Report on Aliment and Financial Provisions} (Scot Law Com No 67, 1981) para 3.98.


\textsuperscript{15} Family Law (Scotland) Act 1985, s 9. The SLC explicitly rejected, amongst others, applying to cohabitants the principle of fair sharing of matrimonial property in section 9(1)(a). Note that fair sharing is equal sharing unless there are special circumstances justifying a departure from this norm: Family Law (Scotland) Act s 10(1).

\textsuperscript{16} Scottish Law Commission, \textit{Report on Family Law} (n 12) para 16.23. Although the Scottish Law Commission recommended a slightly narrower formula than that used in section 9(1)(b) of the 1985 Act, it was a result of their concern that the provision was too vague and too wide. They also recommended such an amendment to the 1985 Act.

\textsuperscript{17} ibid para 16.18.

\textsuperscript{18} ibid.

\textsuperscript{19} ibid Draft Family Law (Scotland) Bill, cl 36(2).
\end{footnotesize}
valuation, in cases where otherwise none could be claimed.\textsuperscript{20} This approach is to be commended, since necessary reforms should not stall on the issue of difficulty. What is necessary to minimise the difficulty is a well drafted piece of legislation.

The lengthy transition from the 1992 Report to the final Act was not straightforward.\textsuperscript{21} In March 1999, the Scottish Office Home Department issued a Consultation Paper\textsuperscript{22} seeking views on the SLC’s proposals. The Scottish Executive\textsuperscript{23} produced a White Paper in 2000\textsuperscript{24} and a Consultation Paper in April 2004,\textsuperscript{25} both of which recommended adopting section 9(1)(b) for cohabitants as part of a ‘fair regime’ in order to provide some legal safeguards to ease the legal difficulties cohabitants may encounter, where the effect of the current law can be considered harsh and unfair.

A Bill was finally introduced to the Scottish Parliament on February 7, 2005, by the then Justice Minister, Cathy Jamieson. The policy objective was stated as being:

[T]o introduce greater certainty, fairness and clarity into the law by establishing a firm statutory foundation for disentangling the shared life of cohabitants when their relationship ends.\textsuperscript{26}

In line with their policy following previous consultations, the Scottish Executive did not intend to give marriage-equivalent rights to cohabitants.\textsuperscript{27} The Scottish Executive was also keen to provide courts with flexibility and discretion in cases in order to secure ‘fair and just outcomes’.\textsuperscript{28} Furthermore, the intention of the Bill was to entitle an economically disadvantaged cohabitant, as a result of the relationship, to some recompense.\textsuperscript{29} This reference to recompense suggests the use of the principle of fairness to compensate for losses suffered.

What is surprising about the Bill Policy Memorandum is the emphasis on the protection of the vulnerable over the aim of achieving fair and reasonable outcomes, which had been prevalent in previous consultations. The Justice 1 Committee, whilst supporting the Scottish Executive’s aim of protecting vulnerable individuals, noted

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  \item \textsuperscript{20} ibid para 16.20.
  \item \textsuperscript{21} In the 14 years in between, family law became a matter devolved to the Scottish Parliament.
  \item \textsuperscript{23} The Scottish Executive took up the process of consultation following the inauguration of the Scottish Parliament. It should also be noted that the Scottish Executive is now known as the Scottish Government.
  \item \textsuperscript{26} SP Bill 36-PM Family Law (Scotland) Bill [policy memorandum] Session 2 (2005), para 64.
  \item \textsuperscript{27} ibid para 65.
  \item \textsuperscript{28} ibid para 75.
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that there was no requirement of vulnerability in the Bill because the justification of the claim was ‘equity and reasonable expectations rather than financial vulnerability’.\textsuperscript{30} This is logical, since this would extend the scope of the provision to all those who have suffered disadvantages and made contributions in a relationship without gaining any advantages, regardless of their financial position when the relationship terminates.

The Scottish Executive reviewed the suggestions and concerns of the Justice 1 Committee and explained that the function of the law in relation to cohabitants should be both protective and remedial:

Protective in the sense that the law should safeguard the interests of those in cohabiting relationships who may be vulnerable by virtue of their exposure to risk or harm. Remedial in the sense that the law should provide a fair and just basis for sorting disputes between cohabitants when things go wrong.\textsuperscript{31}

Therefore, it seems clear that the underlying aim of section 28 is to provide a fair and just outcome to ensure all those vulnerable parties are protected. The Scottish Executive stated that the law needs to provide a ‘framework for fair remedy when committed relationships founder’.\textsuperscript{32} Consequently, the Scottish Executive proposed a framework for compensation where one partner could show that they have suffered net economic disadvantage in the interests of the relationship and emphasised that the financial provision proposed would focus on compensation for an imbalance in the economic outcomes experienced by the parties as a result of their relationship.\textsuperscript{33}

Furthermore, when debating the provisions of the revised version of section 28,\textsuperscript{34} Justice Minister Cathy Jamieson stated that one of the things the Executive had been trying to ensure was:

[T]hat any financial award that the courts make to an applicant addresses the net economic disadvantage that that person may face as a direct result of joint decisions that were made by the couple during the relationship.\textsuperscript{35}

The importance to achieve fairness for both parties was later noted. Consequently, it seems the intention of the Bill before it was passed was that ‘any overall economic disadvantage of one party at the end of the relationship was to be compensated by the other, with a view to achieving fairness’.\textsuperscript{36}

\textsuperscript{30} Justice 1 Committee, ‘Justice 1 Committee Report’ (SP Paper 401, 8th Report, 2005 (Session 2)) para 193 <http://archive.scottish.parliament.uk/business/committees/justice1/reports-05/j1r05-08-vol01-02.htm#cohabsafe> accessed 7 October 2014.
\textsuperscript{32} ibid 14.
\textsuperscript{33} ibid 17.
\textsuperscript{34} The revised version included the balancing provisions in ss28(4), (5) and (6) of the 2006 Act.
\textsuperscript{36} Malcolm, Kendall and Kellas (n 5) para 1-09.
B. Implementation and General Approach to Application of Section 28(2)(a)

The 2005 Bill was finally passed by the Scottish Parliament, receiving Royal Assent on January 20, 2006, and the Family Law (Scotland) Act 2006 came into force on May 4, 2006. However, section 28 has been subject to much criticism. This is a result of its poor drafting, which provides no underlying aim or any guidance on how to interpret and apply the provision. It is surprising that fairness was not incorporated into section 28 as the underlying principle, especially when the concept of fairness is mentioned throughout the consultation process.

Section 28(2)(a) allows the court to make an order requiring payment to the applicant of a capital sum of an amount specified in the order. Before it can do so, the court must be satisfied that, after a full assessment, there is either a net economic advantage to the defender as a result of the applicant’s contributions or a net economic disadvantage to the applicant suffered in the interests of the defender and/or a relevant child. The correct approach to this balancing exercise was uncertain when it was first introduced. However, with the assistance of the authorities to date, it is possible to establish a standard approach to the application of section 28(2)(a). Indeed, the courts now seem to take a step-by-step test to decide if an order should be made. This approach does not deal with all the issues that arise when dealing with a claim under section 28(2)(a), but it does assist in making an assessment of the overall position for a potential claimant more straightforward.

The first step in an application of section 28(2)(a) is to satisfy the procedural requirements. It must be established that the claimant was in a cohabiting relationship and that it ended during the parties’ lifetimes. There are other preliminary considerations to be addressed, such as the requirement under section 28(8) that the application was made not later than one year after the day on which the cohabitants ceased to cohabit, and matters of jurisdiction which are set out in section 28(9). Only once these requirements have been satisfied can the claimant move on to consider the substantive position in relation to the claim to be made.

Secondly, before the court can exercise its discretion to make an award of a capital sum to a former cohabitant, it must consider the matters set out in section 28(3), namely:

(a) whether (and, if so, to what extent) the defender has derived economic advantage from contributions made by the applicant; and
(b) whether (and, if so, to what extent) the applicant has suffered economic disadvantage in the interests of—
   (i) the defender; or
   (ii) any relevant child.

38 G v F 2011 SLT (Sh Ct) 161, [14] (Sheriff McCartney).
40 For a discussion of the potential for dispute over when exactly parties are deemed to have stopped cohabiting see Malcolm, Kendall and Kellas (n 5) para 1-04.
These two matters, however, do not constitute a threshold test to be met before a court can consider whether any award should be made. Consequently, there is no requirement for the matter to stop if there is no evidence of either an economic advantage to the defender or an economic disadvantage to the pursuer. This is the most appropriate and logical approach, since there is nothing in the terms of section 28 to support a threshold test, and section 28(2)(a) simply requires the court to ‘have regard’ to the various matters set out in the subsections. 41

Furthermore, there is no requirement for both aspects of section 28(3) to exist in order for there to be a claim. 42 The UKSC held in Gow v Grant that the underlying principle of section 28 is one of fairness, and it is designed to correct any overall net imbalance arising from contributions made or economic disadvantages suffered in the interests of the relationship. 43 Therefore, an economic imbalance can be measured by reference to the advantages gained by the defender from contributions made by the pursuer, or by reference to the disadvantages suffered by the pursuer in the interests of the defender or any relevant child, or, indeed, both could exist. 44 If both matters in section 28(3) had to be established for a claim, it would narrow the provision and create an unintentional hurdle for claimants.

The third step requires the court to assess whether there is scope for offsetting either or both of the matters in section 28(3). This mandatory balancing exercise for the court is directed by the terms of section 28(4), which states that when considering whether or not to make an order under section 28(2)(a), the court ‘shall’ 45 have regard to the matters in subsections (5) 46 and (6). 47 Therefore, subsections (4), (5) and (6) have a significant impact on the application of the section.

Through a close examination of the subsections however, there is a clear link between the matters in subsections (3)(a) and (5) on the one hand, and between subsections 3(b) and (6) on the other. 48 Accordingly, the more natural and straightforward interpretation of section 28(2)(a) results in the court applying firstly subsections (3)(a) and (5) to the facts of the case. This requires the court to consider whether the defender has derived any economic advantage from contributions made by the applicant and offset against that any economic disadvantage suffered by the defender in the interests of the pursuer or a relevant child. 49 Secondly, the court

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41 Lindsay v Murphy 2010 Fam LR 156, [63] (Sheriff Miller).
42 Sheriff Hogg stated that account must be taken of ss 28(5) and (6) because of the wording ‘shall’ in the provisions: Jamieson v Rodhouse 2009 Fam LR 34, [44] (Sheriff Hogg).
43 Gow (UKSC) (n 1) [33] (Lord Hope).
44 Malcolm, Kendall and Kellas (n 5) para 1-15.
45 This differs from the definition in section 28(2), which requires the court to ‘have’ regard to subsection (3), rather than ‘shall’.
46 Family Law (Scotland) Act 2006, s 28(5): The first matter is the extent to which any economic advantage derived by the defender from contributions made by the applicant is offset by any economic disadvantage suffered by the defender in the interest of the applicant or any relevant child.
47 ibid s 28(6): The second matter is the extent to which any economic disadvantage suffered by the applicant in the interests of the defender or any relevant child is offset by any economic advantage the applicant has derived from contributions made by the defender.
48 Lindsay (n 41) [63] (Sheriff Miller).
49 For a discussion of the possible difficulties in determining a ‘relevant child’, which will not be covered in this paper for reasons of space, see Elaine Sutherland, Child and Family Law (2nd edn, W Green 2008) para 16-200.
should apply subsections (3)(b) and (6). This requires the court to consider whether the applicant has suffered any economic disadvantage in the interests of the defender or a relevant child, and to offset against that any economic advantage the pursuer has derived from contributions made by the defender.

This approach has been adopted in a number of reported cases, and it has been endorsed at appellate level by Sheriff Principal Dunlop QC in *Mitchell v Gibson*:

> [I]t is not appropriate to put all matters into a single melting pot and come to a view about where the balance of advantage and disadvantage falls. The balancing processes required to produce an answer to each of the questions posed by subs.(3) are separate and defined by the provisions of subss.(5) and (6) respectively.

This logical approach follows the precise requirements of the 2006 Act. It ensures that the court makes a full assessment as to whether or not there is an economic imbalance arising from the cohabitation. Furthermore, there is no explicit requirement that the court must ‘balance’ any economic advantages (or disadvantages) pertaining to one party against those pertaining to the other. Therefore, any offsetting is assessed for each party individually, not comparatively.

The final, and arguably the most uncertain, step is the application of the court’s discretion. Even after a full assessment of the case and the court finding that there is a net economic imbalance arising from the cohabitation, the making of an award is by no means guaranteed. Section 28(2)(a) provides that the court ‘may’, after having regard to all these preliminary matters, make an award of a capital sum payment. The UKSC in *Gow v Grant* confirmed that the court has complete discretion in deciding whether to make an award and the amount to be awarded. Section 28(7) also provides the court with wide discretion to specify the timing of the payments required and whether they should be made by instalments.

C. Success and Achievements of Section 28(2)(a)

The 2006 Act has achieved a lot for Scottish cohabitants and their children. When it came into force on 4th May 2006, there were over 150,000 couples cohabiting in Scotland. By 2008, there was an estimated population of 372,000 cohabiting adults in Scotland. As the number of cohabiting couples continues to rise, the introduction of section 28(2)(a) is a step in the right direction to reflect the reality that

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50 See for example: *Lindsay* (n 41); *Jamieson* (n 42).
52 Malcolm, Kendall and Kellas (n 5) para 1-17.
53 *Lindsay* (n 41) [61] (Sheriff Miller).
54 Provided there is a basis in fact for such a decision: *Gow* (n 1) [42] (Lord Hope).
55 It should be noted, however, that the court has no discretion to extend the period of time allowed for an action to be raised under section 28(8).
56 Wasoff, Miles and Mordaunt (n 2) 123.
58 Wasoff, Miles and Mordaunt (n 2) 8.
family structures are changing. By providing limited rights to cohabitants, the position of Scottish cohabitants when a relationship terminates is much better than that of their equivalents in England and Wales.\textsuperscript{60} The introduction of section 28(2)(a) has created a financial remedy for cohabitants on the termination of their relationship where none previously existed.\textsuperscript{61} Furthermore, section 28(2)(a) can act as a bargaining tool in negotiations between parties, which would be preferable to litigation.

However, whereas the case law has shown a somewhat consistent approach to the application of section 28(2)(a), the courts have struggled to find a simple and clear way to interpret and apply section 28. It is clear that section 28 is hardly a model of simplicity and it lacks the crisp clarity of the original SLC proposal.\textsuperscript{62} The substantial reliance on an overriding discretion placed in the hands of the courts, in the absence of an underlying aim and guidance as to how that discretion should be exercised, has caused inconsistencies and uncertainty in the interpretation and application of section 28. The difficulties and uncertainties in making a claim under section 28(2)(a) have led to criticism of the usefulness and effectiveness of the provision, with the view forming that although it has some benefits, there is ‘unfulfilled potential’.\textsuperscript{63} Consequently, it has so far not been as effective an instrument in correcting harsh and unfair situations as it should have been had the legislation been better drafted.

4. Interpretation and Application: The Problems in Making a Claim Under Section 28(2)(a)

A. Inconsistent and Contradictory Approaches to Construction

Despite the consistent reference to fairness throughout the consultation process leading up to the enactment of the 2006 Act, there is no underlying aim or any guidance given on how to construe section 28. This lack of guidance, along with the unfettered discretion given to the courts under section 28(2), has caused uncertainty as to the correct interpretation of the provision for both courts and practitioners.\textsuperscript{64} The first substantial case\textsuperscript{65} concerning section 28(2)(a) was CM v STS.\textsuperscript{66} Lord Matthews stated that, although not identical, sections 28(3), (5) and (6) and section 9(1)(b) of the 1985 Act are ‘so similar’ that the Scottish Parliament ‘must have intended the courts to approach them in the same way’.\textsuperscript{67} Consequently, with the assistance of section 9(1)(b) case law, Lord Matthews held that the burden of

\textsuperscript{61} The pre-2006 remedies were at best difficult to operate and expensive, and at worst simply failed to respond to particular types of problems: Scottish Law Commission (n 11).
\textsuperscript{63} Wasoff, Miles and Mordaunt (n 2) 98.
\textsuperscript{64} 89% of practitioners in a survey (with 62 respondents) viewed interpretation of the cohabitation provisions of the 2006 Act as one of the biggest problem areas of the 2006 Act: Wasoff, Miles and Mordaunt (n 2) 55.
\textsuperscript{65} \textit{Fairley v Fairley} 2008 Fam LR 112, heard by Lord McEwan, was earlier but all that was decided in the case was that the separation happened after the coming into force of the 2006 Act so that the action was competent.
\textsuperscript{66} 2008 SLT 871 (OH) (Lord Matthews).
\textsuperscript{67} ibid [272] (Lord Matthews).
cohabitation must be borne fairly, seemingly meaning equally, regardless of the fact that there is no provision to that effect in the 2006 Act. In effect, Lord Matthews applied the principle of equal sharing of matrimonial property in section 9(1)(a) of the 1985 Act.

This equal sharing approach, however, was not the intention of the legislators. Additionally, Lord Matthews failed to engage in the appropriate balancing exercise and instead offset the applicant’s disadvantages against the defender’s disadvantages, which is not provided for under section 28. Furthermore, although the provisions contained in the two Acts are similar, they are not identical. Importantly, the absence in the 2006 Act of any equivalent to the principle of fair sharing of matrimonial resources or, indeed, to the notion of matrimonial property, results in substantially different starting points of principle between the two pieces of legislation. Under the 1985 Act, the principle is that the net value of the matrimonial property will be shared fairly, with the rebuttable presumption being that property will be shared fairly if it is shared equally. The rebuttable presumption at the end of cohabitation is that each party will retain his or her own property. Consequently, the basis of the 1985 Act scheme is ‘one of entitlement, whereas the basis of the 2006 Act scheme is discretion’. Additionally, there exists greater scope for departure from the basic principle under the 1985 Act, with a further four principles provided, whilst for cohabitants under section 28 the only issue is whether one party has a net economic disadvantage at the end of the relationship. Nevertheless, although Lord Matthews’ approach has been criticised as ‘seriously flawed’, it does not alter the fact that the poor drafting of the provision, lack of underlying aim and guidance, along with the wide discretion afforded to the courts made this construction possible.

Whilst subsequent cases have not followed Lord Matthews’ approach, the courts have struggled to find a consistent approach. However, the Inner House in Gow v Grant held that section 28 is different in both substance and in form from sections 8 to 10 of the 1985 Act, which thus has ‘no bearing on the construction of section 28’. Furthermore, the use of case law on sections 8 to 10 of the 1985 Act as guidance in the construction of section 28 was rejected. The Inner House also commented that the financial provision is ‘in the nature of compensation for an imbalance of economic advantages or disadvantages’. Additionally, the objective of section 28 was stated to be limited in scope, and that it was intended to ‘enable the

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68 ibid [289] (Lord Matthews).
69 Sheriff Mackie noted that although the intention of the Parliament was to adopt a different approach between financial arrangements that apply to spouses or civil partners and cohabitants, no guidance was given regarding which approach to take: Gow v Grant 2010 Fam LR. 21 [39].
70 Lindsay v Murphy (n 41) [61] (Sheriff Miller).
71 Malcolm, Kendall and Kellas (n 5) para 1-10.
72 F v D 2009 Fam LR 111, [7] (Sheriff Hendry).
73 Lindsay v Murphy (n 41) [59] (Sheriff Miller).
74 Malcolm, Kendall and Kellas (n 5) para 1-10.
76 For example, compare the approach taken by Sheriff Mackie in Gow v Grant 2010 Fam LR 21 with Sheriff Miller in Lindsay v Murphy (n 48).
78 ibid.
court to correct any clear and quantifiable economic imbalance that might have resulted from the cohabitation'.\textsuperscript{79} Although this approach has been followed in subsequent cases,\textsuperscript{80} this narrow interpretation of the objective could limit the number of applicants and thus could not be seen to provide the financially vulnerable with adequate protection. Moreover, the Inner House gave a negative decision, in that it gave guidance on how section 28 should not be construed, rather than how it was to be construed.

B. Width of the Court’s Discretion

Section 28(2) of the 2006 Act gives the court an unfettered discretion as to whether or not an award of capital is to be made. The 2006 Act does not, however, provide any guidance as to how the court should exercise its discretion nor does it provide an underlying aim. Therefore, the terms of section 28 do not require the court to make any order if economic advantage or disadvantage is established; it does no more than allow the court to do so.\textsuperscript{81} Although it has been recognised that the discretion must be exercised reasonably,\textsuperscript{82} the width of the court’s discretion is a problematic area for practitioners.\textsuperscript{83} Consequently, with uncertain advice, the more financially vulnerable that the provisions were intended to protect may be discouraged from making a claim under section 28(2)(a) because of the uncertainty and risk involved.

It was the intention of the legislators to provide the court with sufficiently wide discretion because the Bill should not be too prescriptive when people are not.\textsuperscript{84} Indeed, the Scottish Executive felt it was ‘right and proper’ that the courts should consider ‘any and all relevant factors’\textsuperscript{85} in order to reach ‘appropriate’ judgments, rather than constructing rules and provisions to accommodate every circumstance.\textsuperscript{86} Such rules and provisions are neither desirable nor possible in a completely new area of law such as this. However, there is a distinction between a complete lack of rules and provisions on one hand and some limited guidance and an underlying principle on the other; otherwise the courts have no direction to reach the ‘appropriate’ judgments the Scottish Executive desires.

The case law has suggested some factors that may have a bearing on the exercise of the court’s discretion, such as significant contributions from one party to the other party’s living costs over the duration of the cohabitation,\textsuperscript{87} post-

\textsuperscript{79} ibid [4] (Lord Drummond Young).
\textsuperscript{80} For example see: G v F (n 38) (Sheriff McCartney); Harley v Robertson 2011 WL 6329320 (Sheriff Caldwell).
\textsuperscript{81} G v F (n 38) [47] (Sheriff McCartney).
\textsuperscript{82} ibid [48] (Sheriff McCartney).
\textsuperscript{83} 85% of practitioners in a survey (with 60 respondents) viewed the width of the court’s discretion as a problem area of the 2006 Act: Wasoff, Miles and Mordaunt (n 2) 55.
\textsuperscript{84} See Kirsty Finlay in Justice 1 Committee (n 29).
\textsuperscript{85} Scottish Parliament (n 35) Justice Minister Cathy Jamieson at col 21908.
\textsuperscript{86} Scottish Executive (n 25).
\textsuperscript{87} It may be reasonable for the court to take into account that one of the parties have made a significant contributions towards the parties’ living costs over the cohabitation: Malcolm, Kendall and Kellas (n 5) para 1-21.
cohabitation contributions and reference to resources. However, without any guidance or an underlying aim, it will be extremely difficult to predict what factors the court will take into account in the exercise of its discretion. This seems contrary to the policy objective of greater certainty, fairness and clarity.

C. Quantification of a Claim

The issue of quantifying a cohabitant’s claim under section 28 has been a matter of some difficulty for practitioners. Yet again, no guidance is provided for in the 2006 Act. Quantification of gains and losses in capital, income or earning capacity would be unlikely to cause great difficulty in the majority of cases. The greatest difficulty in quantification arises when a value has to be placed on non-financial contributions, which, under section 28(9), specifically include looking after any relevant child or any home in which the parties cohabited. Although this may be possible by looking at the cost of buying such services, in some cases, such as where one is trying to assess the value of the pursuer’s contributions with reference to the improved earning capacity of the defender, it may be almost impossible to achieve quantification of the claim. Furthermore, it has been suggested that case law relating to section 9(1)(b) may still offer some guidance as to the quantification of such gains or losses. Even if this is possible, the level of guidance that can be provided is doubtful.

The Inner House in Gow v Grant held that section 28 was only intended to correct any ‘clear and quantifiable’ economic imbalance that might have resulted from cohabitation. This is an extremely narrow approach and it would seem to preclude anything other than an accurate arithmetical approach to quantification. Therefore, parties who were intended to be protected by the legislation may be excluded simply because their claim is difficult to quantify with any accuracy. This precise approach was not the intention of the legislators. It also seems to contradict the legislation, which specifically includes non-financial contributions and those that are by their nature difficult to quantify. Furthermore, it would be unusual for parties

88 Nothing in the provision limited ‘contributions’ as defined in section 28(9) only in so far as made during the period of cohabitation: Lindsay v Murphy (n 41) [67] (Sheriff Miller).
89 Sheriff McCartney stated that in the exercise of the court’s discretion, the court must consider the particular facts and circumstances of the individual case, and then consider whether or not weight should be attached to present financial circumstances and resources: G v F (n 38) [48].
90 Malcolm, Kendall and Kellas (n 5) para 1-28.
91 Gains and losses in capital can be examined by looking at the actual capital introduced into the relationship; gains and losses in income can be assessed by looking at the level of income during the course of the cohabitation; gains and losses in earning capacity would possibly rely on being able to establish comparators. It should be noted that any increase in value has to be demonstrated as having derived from the claimant’s contributions.
92 Malcolm, Kendall and Kellas (n 5) para 1-29.
93 ibid para 1-11.
94 In most divorce actions, economic advantage and disadvantage claims under section 9(1)(b) are much more muted since the main award will normally be the fair sharing of the matrimonial property: Family Law Bulletin, Cases in Brief, CM v STS, (2008) CSOH 125, 98(Sep).
95 Gow (Inner House) (n 77) [4] (Lord Drummond Young).
96 Scottish Law Commission (n 12) para 16.20.
to keep a full and detailed account of their finances throughout the cohabitation. It is not in the nature of relationships for contributions and sacrifices made to be precise, and consequently the approach adopted by the Inner House would be unable to provide fair and ‘appropriate’ awards in many cases.

D. Determining an Economic Advantage, Disadvantage and Contribution

In terms of section 28(9) an economic advantage includes gains in (a) capital; (b) income; and (c) earning capacity, with a disadvantage being construed accordingly. In the majority of cases, there should not be great difficulty in assessing what constitutes either a gain or a loss in capital or earning capacity. However, there has been an element of confusion in assessing gains or losses in income. It was common in arguments made to attempt to satisfy a claim for a loss or gain in income to rely on the fact that one party rather than the other bought and paid for food or household bills. The Inner House in *Gow v Grant*, however, held that section 28 was not designed to deal with ‘any wider financial issues that might have arisen between parties’. Indeed, it was not the intention of the legislators to provide a provision for such detailed scrutiny of the parties’ expenditure during the cohabitation. However, the Inner House was not explicit in its decision and did not provide any clarification on what ‘wider financial issues’ can include.

Furthermore, there is no determinative list of what may or may not be considered to be an economic advantage or disadvantage. Rather, the three defined categories of gains or losses included under section 28(9) are identical to those under section 9(2) of the 1985 Act. Therefore, since the Inner House in *Gow v Grant* seemingly confined its rejection of section 8 to case law to matters of construction of section 28, there has been uncertainty as to whether or not cases decided under section 9(1)(b) could provide some limited guidance as to what may be considered appropriate to take into consideration as an economic advantage or disadvantage. Until clarification is received on this matter, however, use of section 9(1)(b) case law for this purpose must be approached with caution. Whilst the Inner House did not explicitly reject this approach, it did nothing to promote it.

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97 Sheriff Mackie noted that no one prepares for their relationship to fail: *Gow* (Sheriff Court) (n 69) [67].
98 For example, losses in any of the three categories.
99 For example, earning capacity can be affected if one party gives up a career to care for children or, indeed, their partner; whilst a party may suffer a loss of capital if he/she pays a substantial sum towards the cost of a property that is in the name of the other party: Malcolm, Kendall and Kellas (n 5) para 1-25.
100 An applicant stated she had paid for her own and her son’s food during the cohabitation: *Jamieson* (n 49) [6] (Sheriff Hogg).
101 An applicant stated that she paid a monthly bill to Virgin Media, which covered the parties’ television and telephone accounts: *F v D* (n 72) [17] (Sheriff Hendry).
102 *Gow* (Inner House) (n 77) [4] (Lord Drummond Young).
103 ibid.
104 It has been suggested that where the definitions are in effect identical, it could allow for direct comparisons of what has been considered to constitute an economic advantage or disadvantage under the 1985 Act: Malcolm, Kendall and Kellas (n 5) para 1-11.
E. Connection Between Contributions and Interests

Section 28(3)(a) requires a connection to be established between the economic advantage gained by the defender and the contribution from the pursuer that has given rise to that gain.\textsuperscript{105} Similarly, in relation to the assessment of a pursuer’s economic disadvantage, section 28(3)(b) requires the pursuer to demonstrate that the economic disadvantage claimed has been suffered in the interests of the defender or any relevant child.\textsuperscript{106} There has been uncertainty however, regarding what is to be considered as ‘in the interests of.’ The Inner House in Gow v Grant held that what is required is for the pursuer to show that any economic disadvantage was suffered ‘in a manner intended to benefit the defender’.\textsuperscript{107} However, there is no requirement for such a narrow interpretation of the provision,\textsuperscript{108} and it may further restrict the number of cases brought under section 28(2)(a), especially since the balancing exercise required in subsections (5) and (6) also require such a connection between contributions and interests. This interpretation by the Inner House was not what the Scottish Executive intended, since it stated that a cohabitant should show that ‘he or she has made more contributions or sacrifices in the interests of the relationship’.\textsuperscript{109} The introduction of a test of intention has the potential to be severely unfair in many cases, since it is not uncommon for a party in a relationship to suffer economic disadvantage in one’s own interests as well as in the interests of the defender or the relevant child.

5. Gow v Grant: The UKSC Judgment

It is fair to say that the Inner House in the case Gow v Grant\textsuperscript{110} did not deal with many of the issues regarding interpretation and application of section 28. As previously discussed, the decision arguably made a claim under section 28(2)(a) even more difficult to pursue in certain aspects. Importantly, the case was taken to the UKSC. There, Lord Hope gave the principal judgment in this leading case concerning a claim under section 28(2)(a), with significant contributions from Lady Hale.

A. The Judgment

\textsuperscript{105} Therefore, if the defender’s economic advantage has not been derived from contributions of the pursuer, the court would be unlikely to make an award on that basis see: Selkirk v Chisholm 2011 Fam LR 56.

\textsuperscript{106} A ‘relevant child’ is defined in section 28(10) as a child of the couple or who is accepted as a child of the family.

\textsuperscript{107} Gow (Inner House) (n 77) [9] (Lord Drummond Young).

\textsuperscript{108} Sheriff Principal Dunlop, whilst holding that there was no warrant for requiring economic disadvantage to have been suffered solely in the interests of the defender, noted that all that was required was to establish that any disadvantage was suffered in the interests of the defender ‘to some extent’, and the fact the pursuer has suffered economic disadvantage in one’s own interest as well as in the interest of the defender was a factor the court may take into account in the overall exercise of its discretion: Mitchell v Gibson (n 51) [13] para 13.

\textsuperscript{109} Hugh Henry (n 31), 17.

\textsuperscript{110} Gow (Inner House) (n 77).
Through an examination of the background to the legislation, Lord Hope clarified that fairness is the guiding principle of section 28. The purpose of the judicial exercise is to achieve fairness between both parties to the relationship in the assessment of any capital sum that the defender is ordered to pay to the applicant. Importantly, Lord Hope distinguished between the concept of ‘fairness’ in the context of section 28 of the 2006 Act and section 9(1) of the 1985 Act. Thus, ‘fairness’ in the context of section 28 did not mean equal sharing. Instead, section 28 seeks to achieve fairness in the assessment of compensation for contributions made or economic disadvantages suffered in the interests of the relationship.

Furthermore, Lord Hope held that the approach in the application of section 28 is indeed different from the approach in the application of section 9. Although there are identical expressions in the two provisions, the wording and context of section 9 is different to that of section 28, thus requiring the court to conduct an ‘entirely different exercise’ between the two schemes. However, Lord Hope found that section 28 was designed to achieve the same purpose as section 9(1)(b), namely to award fair compensation, on a rough and ready valuation in cases where otherwise none could be claimed. Consequently, cases decided under section 9(1)(b) may be of assistance in determining what the court might take into account as an economic advantage, disadvantage or contribution.

Lord Hope stated the wording of subsections (3), (5) and (6) should be read broadly rather than narrowly. Therefore, although the phrase ‘in the interests of the defender’ in sections 28(3)(b) and (6) can be taken to mean ‘in a manner intended to benefit the defender’, such an interpretation is too narrow and thus is not compulsory. Additionally, Lord Hope felt it is more important to look at the ‘effect of the transaction rather than the intention’ because there is no requirement that any economic disadvantage suffered by the applicant was in the defender’s interests only. Failing to do so would not give effect to the true meaning and effect of the provisions.

Lord Hope also held that the overriding principle of section 28 was one of fairness, and regard should be had as to where the parties were at the beginning of their cohabitation and where they were at the end. Therefore, to approach section 28 on the basis that it was intended to correct any ‘clear and quantifiable’ economic imbalance that might have resulted from cohabitation is too narrow. Indeed, contributions and sacrifices in non-commercial relationships of the kind that family

111 Lord Hope found that there has been a consistent emphasis on fairness to both parties in the pre-legislative consultations and discussions: Gow (Supreme Court) (n 1) [31].

112 ibid [33] (Lord Hope).

113 ibid [35] (Lord Hope).

114 ibid [15] (Lord Hope).

115 ibid [36] (Lord Hope).

116 ibid.

117 ibid [33] (Lord Hope).

118 ibid [38] (Lord Hope).

119 ibid.

120 Although this case dealt with sections 28(3)(b) and (6) of the 2006 Act, the broad approach would also apply to sections 28(3)(a) and (5).

121 Gow (UKSC) (n 1) [40] (Lord Hope).

122 ibid [36] (Lord Hope).
law must deal with cannot often be valued precisely.\textsuperscript{123} Furthermore, it would be unusual for parties to keep full and detailed accounts of their finances from the start of the cohabitation. Therefore, a ‘broad brush’ approach is necessary in the majority of cases.

Lord Hope confirmed that section 28 afforded courts complete discretion over both the making of an award and the amount to be awarded, provided there is a basis in fact for the decision it takes.\textsuperscript{124} Additionally, well recognised principles limit the scope for interference by the appellate court. Thus, an appellate court should not interfere with a decision unless it can be shown that the judge, in the exercise of his discretion, misdirected himself in law or failed to take account of a material factor or reached a result which was manifestly inequitable or plainly wrong.\textsuperscript{125}

B. Analysis of the Judgment

Whereas the Inner House decision had been criticised for its narrow scope and objective, and led to concern as to whether it would be possible to make meaningful use of the 2006 Act, the UKSC decision provides clarification of section 28 and provides fresh hope that there is still scope for a fair outcome in cohabitants’ claims.\textsuperscript{126} Firstly, the judgment corrected some of the deficiencies in the drafting of the legislation. It seems that with the establishment of the overriding principle of fairness, as well as the purpose of the judicial exercise taken to be achieving fairness in the assessment of compensation for contributions made or economic disadvantages suffered in the interest of the relationship, section 28(2)(a) is finally set to achieve what the legislators intended. Secondly, the rejection of a requirement to prove intention to benefit the defender avoids the introduction of an unnecessary test which is neither set out in section 28 itself nor is in line with the aims of the legislation to rectify financial imbalance between former cohabitants.\textsuperscript{127} Furthermore, the broad construction of the provisions to allow contributions made in the interests of the relationship rather than solely in the interests of the defender or any relevant child will help ensure a fairer outcome in cases. Finally, the courts must take a ‘broad brush’ approach to quantification rather than an accurate arithmetical approach. Although a ‘broad brush’ approach is likely to be more uncertain, it would be better suited to provide fair and ‘appropriate’ awards, as well as being in line with the intention of the legislators and the provision itself.

Nevertheless, although the UKSC has clarified certain issues, uncertainty and difficulties continue to exist in claims made under section 28(2)(a). Firstly, the notion of fairness is by no means certain. Subjectivity is inherent in fairness. Although the court is required to decide what is fair, each party will have a different

\begin{itemize}
\item \textsuperscript{123} ibid.
\item \textsuperscript{124} ibid [42] (Lord Hope).
\item \textsuperscript{125} Gray \textit{v} Gray 1968 SC 185, 193 (Lord Guthrie).
\item \textsuperscript{127} Additionally, the requirement of intention may involve complex argument and reduce the efficiency of cases: Rebecca Kelly, ‘Calculating the Cost of Cohabitation: A Consideration of \textit{Gow v Grant (Scotland)} [2012] UKSC 29’ (2013) 47 The Law Teacher 102, 107.
\end{itemize}
view as to what is fair. Secondly, the extent of guidance from section 9(1)(b) cases in determining an economic advantage, disadvantage and contribution under section 28(9) is uncertain, since the provision has received relatively little attention because of the other principles available under the 1985 Act to spouses and civil partners.

Finally, and most importantly, uncertainty remains over two major issues, namely how the court will exercise its discretion and how to quantify a claim under section 28(2)(a). Although Lady Hale commented on the potential usefulness of a list of factors that a court should take into account when exercising its wide discretion, no such factors were given. Instead, the amount awarded to the respondent in the first instance, which Sheriff Mackie had arrived at from a ‘broad brush’ approach, was upheld. Although a ‘broad brush’ approach is favoured to an accurate arithmetical approach, the complete lack of guidance in the quantification of a claim makes it extremely difficult for practitioners to offer clients certain and clear advice. Additionally, as a consequence of the broad judicial discretion as to the interpretation of ‘fairness’, courts and practitioners will continue to find it difficult to quantify such claims.

Furthermore, Lord Hope stated that Sheriff Mackie’s decision at first instance was ‘well within the band of reasonable decisions that were open to her’, which emphasises the width of the court’s discretion. The ‘band’ of reasonable decisions will undoubtedly change depending on the facts and circumstances of a case. Although this is appropriate and desirable, it may be difficult for a judge, in certain cases, to determine the band of reasonable decisions without any factors the court should take into account when exercising its discretion or any guidance as to how to quantify a claim under section 28(2)(a). Therefore, the overall position for courts, practitioners and ultimately cohabitants has not altered significantly.

C. Impact on a Claim Under Section 28(2)(a)

The first reported case after the UKSC judgment was Whigham v Owen. Lord Drummond Young, whilst following the UKSC’s judgment, confirmed that uncertainty and difficulties remain in a claim under section 28(2)(a). The difficulty with the notion of fairness is compounded with the broad discretion given to the court to decide what is fair.

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129 It should also be noted that although the concepts are apparently identical, their application are rather different. For example, section 11(2) of the 1985 Act requires the court to balance advantages or disadvantages pertaining to one party against those pertaining to the other, whereas the offsetting is assessed for each party individually, not comparatively, in a section 28(2)(a) claim.
130 Gow (UKSC) (n 1) [55] (Lord Hope).
131 Gow (Sheriff Court) (n 69) (Sheriff Mackie).
133 Gow (Sheriff Court) (n 69) (Sheriff Mackie).
134 Gow (UKSC) (n 1) [43] (Lord Hope).
135 Whigham v Owen [2013] SCOH 29 (Lord Drummond Young).
courts, which ‘most judges and sheriffs feel uncomfortable with’. The biggest difficulty Lord Drummond Young found was how to approach the quantification of a claim without any proper guidance in the legislation as to what the amount of that award should be. However, he did note that awards in cohabitation cases should generally be lower than those in divorce. Although Lord Drummond Young made reference to the Scottish Law Commission’s recommended approach in quantifying a claim under section 29, he did not provide an explanation as to how he arrived at his figure.

In the more recent case of Smith-Milne v Langler, Sheriff-Principal Pyle commented that although uncertainty remains in the quantification of a claim, this is a necessary consequence of a broad brush approach. Furthermore, he was of the opinion that over time, the build-up of case law may reduce the uncertainty for judges and practitioners. Indeed, the case of Cameron v Lukes has shown that ‘proper, evidential material’ must exist in order to found the court’s decision in any section 28 application. Nevertheless, the current situation for cohabitants is still by no means perfect. Therefore, bearing in mind the policy objective of achieving greater certainty, fairness and clarity, various reform methods for future claims under section 28(2)(a) will now be examined.

6. The Future of a Claim Under Section 28(2)(a)

A. Statutory Intervention

The cause of a majority of the problems and difficulties faced by judges and practitioners when dealing with a claim under section 28(2)(a) is the poor drafting of the Scottish legislation, which left many important issues of principle unarticulated and lacked any guidance on matters of interpretation and approach. However, with fairness established as the guiding principle of section 28 and clarification on matters of construction and purpose of the provisions, it is contended that the UKSC decision in Gow v Grant has cured various deficiencies in the legislation. Accordingly, the position for cohabitants upon the cessation of their relationship is now what it should have been had the 2006 Act been drafted properly.

The problem of uncertainty and the difficulties it currently causes should be regarded as ‘early days’ effects, which is to be expected for a new piece of legislation such as section 28, which ‘breaks new ground’ rather than merely adding to existing law. Therefore, over time, it is likely that practitioners will become more familiar with the operation of section 28(2)(a). Additionally, with the incidence of

136 ibid [10] (Lord Drummond Young).
137 ibid [12] (Lord Drummond Young).
139 2013 Fam LR 58 (Sheriff Principal Pyle).
140 2013 WL 7090818 (Sheriff Principal Scott).
141 ibid [18] (Sheriff Principal Scott).
143 ibid. The caution is issued by Ira Ellman.
144 Wasoff, Miles and Mordaunt (n 2) 124.
cohabitation expected to increase in the future, it is logical to assume that the incidence of cohabitation breakdown will also increase. Therefore, through a build-up of case law, it is hoped that greater guidance can be sought from it by both judges and practitioners in order to approach section 28(2)(a) claims with more confidence. A clear example is provided by the financial provisions upon divorce within the 1985 Act, which, although now having become very workable, also took time to settle in.\textsuperscript{145} It is hoped that after the inevitable bedding-in period, the same will apply to the 2006 Act, and judges and practitioners will feel much more at ease when dealing with section 28(2)(a) claims in the future.

Furthermore, even the best-laid plans and guidance can have unintended or unexpected consequences.\textsuperscript{146} The legislators do not need to look any further than section 28 to acknowledge this universal truth. Reforming the law relating to cohabitants brings special controversy, and any proposal has both advantages and disadvantages. Thus, there is a great level of risk in any new legislation. With the underlying principle of fairness established and a general consensus on the approach to the application of section 28(2)(a) cases, the courts are now much better placed to deal with section 28(2)(a) claims than when the 2006 Act was enacted. Consequently, it would be unwise for the legislators to interfere now when the platform has been set to achieve greater consistency, fairness and clarity. Instead, at least for the time being, the legislators should allow the courts to apply the current law, ensuring the decision of \textit{Gow v Grant}\textsuperscript{147} is followed, and bear in mind the valuable caution: ‘Be careful. Things may not work out as you expect’.\textsuperscript{148}

\subsection*{B. Limiting The Court’s Discretion}

It is clear that the width of the court’s discretion provided by section 28(2) is uncomfortable for both judges and practitioners. The UKSC has emphasised this discretion by stating that there is a ‘band of reasonable decisions’ open to judges. This can make it even more difficult to predict an outcome in order to give clearer advice to clients, whilst reducing the possibility of appeal.\textsuperscript{149} Therefore, it has been suggested that a list of discretionary factors to be taken into account in the exercise of the court’s discretion, like those found in the (UK) Law Commission’s \textit{Report on Cohabitation: The Financial Consequences of Relationship Breakdown},\textsuperscript{150} may be a useful addition to section 28.\textsuperscript{151}

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\begin{itemize}
  \item \textsuperscript{145} ibid 60. Practitioners responding to a study regarding their experiences with the cohabitation provisions of the 2006 Act recalled their experience of the divorce financial provisions in the 1985 Act, stating it took a period of time for the initial difficulties and uncertainties to dissipate.
  \item \textsuperscript{147} \textit{Gow} (UKSC) (n 1).
  \item \textsuperscript{148} Miles, Wasoff and Mordaunt (n 146) 167.
  \item \textsuperscript{149} Gordon Junor, \textit{‘Gow v Grant – Section 28 Family Law (Scotland) 2006 Explained’} (2012) 80(3) Scottish Law Gazette 65, 68.
  \item \textsuperscript{150} Law Commission, \textit{Cohabitation: The Financial Consequences of Relationship Breakdown} (Law Com No 307, 2007).
  \item \textsuperscript{151} \textit{Gow} (UKSC) (n 1) [55] (Lady Hale).
\end{itemize}
Although the 2006 Act has provisions which are similar in many respects to those which the Law Commission recommends, a closer inspection reveals substantial differences. The Law Commission’s recommendations, which have not been implemented, include a relatively ‘weak’ discretion given to courts because of a proposed list of factors to be taken into account in the exercise of the court’s discretion. It is true that greater legislative detail reduces the need for later judicial elaboration, and the ‘principled discretion’ may reduce some uncertainty for both judges and legal practitioners. However, the reduction in uncertainty comes at the cost of reduced flexibility in the face of idiosyncrasies of particular cases. It should be remembered that cohabitation is ‘a less formal, less structured and more flexible form of relationship than either marriage or civil partnership’, and this must be reflected in the law. Whether an appropriate set of discretionary factors can be developed to take account of all the different types of cohabiting relationships is doubtful, especially at a time where cohabitation is ever-increasing. Therefore, in order to ensure fairness can be achieved in all cases, it is likely that any guidance given will not be exhaustive, and overall uncertainty will remain.

Both advisers and decision makers seem to instinctively shrink from a scheme which, by its nature, involves a wide degree of judicial discretion in arriving at an award. However, such wide discretion is familiar in other jurisdictions and to suggest that it is a complete novelty to the Scottish courts would be a mistake. Indeed, Lord Hope famously characterised the scheme of section 9 as ‘essentially one of discretion, aimed at achieving a fair and practicable result in accordance with common sense’. A list of factors to be taken into consideration under in a section 28(2)(a) claim is desirable. It would make it easier for practitioners to predict the outcome of clients’ cases. However, the law in a new and complex area such as this should not be made easier just for the sake of it. Instead, the law must be able to adapt to all cases, whatever the facts and circumstances, and provide fair outcomes and adequate protection. If a list is to be introduced, it must not inhibit the court’s

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152 HC Deb 6 March 2008, vol 472, col 122WS.
153 HC Deb 6 September 2011, vol 532, col 15WS.
154 A strong discretion is where ‘the judge is at liberty to arrive at the order by taking into account whatever factors, and attaching to them whatever normative significance, he or she thinks fit’: Simon Gardner, ‘The Remedial Discretion in Proprietary Estoppel’ (1999) 115 Law Quarterly Review 438, 461.
155 Law Commission, Cohabitation: The Financial Consequences of Relationship Breakdown (n 150) para 4.38. There are five discretionary factors proposed.
156 ibid, paras 4.15 – 4.17.
157 Miles, Wasoff and Mordaunt (n 142) 316.
158 ibid 319.
159 Lindsay v Murphy (n 41) [58] (Sheriff Miller).
160 For example, the Cohabitation Bill provided a list of 15 discretionary factors, the last one being ‘any other circumstance which the court considers relevant’. The variety of the list of factors meant the objective of the provision was unclear.
161 Robert Gilmour, ‘Section 28 and Section 9(1)(b) – How Do They Relate?’, (2013) SLT 265, 266.
162 Little v Little 1990 SLT 785, 787.
164 If this were the case, the Supreme Court should have simply upheld the decision of the Inner House in Gow v Grant: Gibb, (n 128) 6.
ability to achieve fair outcomes in section 28(2)(a) claims. Therefore, the narrow context envisaged for an award being made in the Law Commission’s proposals is undesirable.\footnote{Malcolm, Kendall and Kellas (n 5) para 156.} Furthermore, discretionary factors, and the Law Commission’s proposals as a whole, will not reduce the uncertainty in the quantification of a claim,\footnote{Rebecca J Probert, ‘A Review of Cohabitation: The Financial Consequences of Relationship Breakdown Law Com No 307 (HMSO 2007)’ 41 Family Law Quarterly Review 521, 532.} another major difficulty faced by judges and practitioners in a section 28(2)(a) claim.

C. Quantification – Guidance

Quantification of claims remains difficult for both courts and practitioners. Therefore, guidance regarding how to quantify a claim under section 28(2)(a) is highly desirable so as to achieve greater certainty in the law. However, it is in the nature of a claim based on contributions or sacrifices to be difficult to value precisely. As previously discussed, there are some non-financial contributions that will be impossible to quantify. Additionally, the adoption of a ‘broad brush’ approach rather than one requiring precise calculation is to ensure that, after a full assessment of the facts and circumstances of the individual case, the court has flexibility to make a fair award for any net economic imbalance. Consequently, it would be ‘unwise to be overly prescriptive’ about the order which the court should make to redress any economic imbalance.\footnote{Gow (UKSC) (n 1) [55] (Lady Hale).}

The difficulty in providing the right level of guidance can be seen in the ‘appropriate percentage’ approach recommended by the SLC.\footnote{Scottish Law Commission (n 138).} Although this approach was created for section 29 of the 2006 Act,\footnote{s 29 allows a surviving cohabitant to make a claim for financial provision following the death of their partner.} it was designed to assist the courts to quantify claims without any guidance from the legislation. Therefore, it is possible to envisage an equivalent scheme for a claim under section 28(2)(a) as follows. Firstly, the court would determine the extent, expressed as a percentage, to which the claimant should be regarded as a spouse or civil partner for divorce purposes.\footnote{ibid para 4.18.} The percentage is fixed by reference to only three factors: (i) the length of the cohabitation; (ii) the interdependence of the couple, financially and otherwise, and (iii) the financial and non-financial contributions the claimant had made to their life together.\footnote{David Nichols, ‘Reform of the Law of Succession’ (2010) 14 Edinburgh Law Review 306, 312.} The court’s discretion is solely focused on the nature of the parties’ relationship, rather than the financial positions the cohabitants end up in. Thus, the ‘scheme’s rationale is to reward for past inputs, not provision for future needs’.\footnote{Scottish Law Commission (n 138) para 4.22.} Finally, the judge will determine what the applicant would have been entitled to on divorce and pay the cohabitant the appropriate percentage.\footnote{ibid para 4.14.}
The ‘appropriate percentage’ approach, which has not been implemented, is not without its problems. It still leaves the court with much discretion, since the court is required to fix the appropriate percentage. Additionally, no guidance is given as to the weight of each of these factors. Therefore, uncertainty remains over how the judge will weigh each factor and calculate the appropriate percentage. Furthermore, the ‘veil of ignorance’ created by looking purely at the past can cause unfairness in cases where a former cohabitant has made a significant contribution to the other after the end of the cohabitation. Consequently, this approach may not be best suited for the purpose of a claim under section 28(2)(a), namely, to achieve fairness between both parties to the relationship in the assessment of any capital sum that the defender is ordered to pay to the applicant. Overall, this proposal seems unlikely to reduce the current uncertainty regarding quantification of section 28(2)(a) claims, whilst potentially undermining the underlying principle of fairness which lies at the heart of the award made under this provision.

There is optimism however, that quantification of claims will become easier and more predictable after the provision has had a chance to ‘bed-in’. It is hoped that over time there will be guidance from decisions of the higher courts which will further reduce the current uncertainty.

D. Increasing Public Awareness

The media publicity surrounding the 2006 Act focused mainly on reforms to divorce laws, and overshadowed the cohabitation provisions. Consequently, the current lack of public knowledge of the financial provisions available to cohabitants upon the termination of their relationship is a major concern. If people do not know about it, they will not claim it. If the provisions are unused, they may as well not be there. The strict one-year time limit to bring a claim under section 28(2)(a), with no discretion given to the court to extend it, means that it can easily be missed if unaware of the provisions. Additionally, improving public awareness will provide a better balance between liberty and protection, by allowing parties who wish to opt-out of this provision to do so by putting in place a pre-cohabitation agreement.

There is an even greater danger that the limited media publicity afforded to increased rights for cohabitants results in cohabitants deriving a false sense of security from their own misconceptions, thereby failing to conclude cohabitation agreements when they would have done so if they had the appropriate knowledge. Indeed, the public’s misconception of a ‘common law marriage’ is both startling and concerning. Furthermore, with the judicial divergence over how

175 This is known as the ‘veil of ignorance’: Scottish Law Commission (n 138) para 4.19.
176 Gow (UKSC) (n 1) [31] (Lord Hope).
177 Wasoff, Miles and Mordaunt (n 2) 59.
178 Miles, Wasoff and Mordaunt (n 146) 170.
180 57% of respondents in a survey in Scotland believed that unmarried couples who live together have a ‘common law marriage’ that gives them the same rights as married couples: Scottish Executive
to apply the new legislation, lay people could be forgiven for failing to understand the precise content of the new provisions, when they apply and the implications for their lives. The introduction of cohabitation laws in England and Wales may increase public awareness, but since such laws will not be introduced until at least the next Parliament,\textsuperscript{181} the onus is on the Scottish Government to increase public awareness of the correct law relating to cohabitants. Increasing public awareness is now paramount in Scotland with the ever-rising number of cohabiting couples who are unaware of their legal rights.\textsuperscript{182} Otherwise, section 28(2)(a) can never fulfil its full potential as a useful and effective tool for providing fair outcomes and offering adequate protection.

7. Conclusion

The introduction of section 28 is a step in the right direction. The objectives behind the Act, namely to introduce greater certainty, fairness and clarity into the law and to protect the economically vulnerable, are necessitated by modern needs. The Scottish legislators should therefore be commended for taking the initiative to reflect the reality that the incidence of cohabitation is increasing. However, the introduction of a good concept has not led to a good law. The poor drafting of the legislation left many important issues of principle unarticulated and provided no guidance to courts as to how to interpret and apply the provision. This lack of direction to the courts, compounded by the unfettered discretion given to them, has led to varying and contradictory case law. Furthermore, following the narrow approach taken by the Inner House in \textit{Gow v Grant}\textsuperscript{183} on the construction and purpose of section 28, the effectiveness and usefulness of the provision was seriously doubted.\textsuperscript{184} The UKSC however, has cured some of the deficiencies in the drafting of the legislation. The courts have now been given direction as to how to exercise their broad discretion when deciding whether an award should be made, namely to achieve fairness in the assessment of compensation for contributions made or economic disadvantages suffered in the interests of the relationship.\textsuperscript{185}

Nevertheless, uncertainty remains over how the courts will exercise their discretion when determining the notion of fairness, and the difficulties in quantifying a claim without any guidance persist. There is no doubt that greater clarity and certainty can be achieved by providing discretionary factors and guidance as to how to quantify a claim. It will become easier for the practitioners to

\textsuperscript{181} HL Deb 6 September 2011, vol 730, col WS19.


\textsuperscript{183} \textit{Gow} (Inner House) (n 77).

\textsuperscript{184} Kirsty Malcolm, ‘\textit{Gow v Grant – The Appeal, A Help or a Hindrance?’} (\textit{Murray Stable}, 2 September 2011)\textless \texttt{www.murraystable.com/assets/files/articles/Gow_v_Grant_The_Appeal,_a_help_or_a_hindrance.pdf}\textgreater  accessed 7 October 2014.

\textsuperscript{185} ibid [33] (Lord Hope).
predict the outcome. However, the underlying aim of the provision has been established as fairness. It should be kept in mind that the distinction between discretion and rules is one that lies along a spectrum, not a sharp dichotomy. Even with the most in-depth research and discussions, it will be extremely difficult to achieve the appropriate balance between the right level of discretion afforded to judges, necessary to ensure they are able to deal with all types of different cohabiting relationship, and any guidance or rules introduced to create more certainty. At a time where there have not been many cases going through court, it will make the task of formulating such guidance even harder. Therefore, it is currently better for the law to be uncertain yet able to provide a fair outcome than a law that is certain but is unable to adapt to certain cases in order to achieve fairness.

The uncertainty and difficulties that remain in a claim under section 28(2)(a) should be seen as ‘early days’ effects. Especially in such a controversial and difficult area as this, the provisions cannot have been expected to operate immediately without difficulties. After all, it took time for the divorce provisions under the 1985 Act to settle in. Following the decision of Gow v Grant, which clarified fairness as the guiding principle and stated that a broad approach should be taken, the law is now at the position it should have been when it was enacted had it been drafted properly. Therefore, section 28(2)(a), read in conjunction with Gow v Grant, should now be given time to bed in. It is hoped that over time there will be enough decisions of the higher courts to guide judges and practitioners so that much of the uncertainty will be dissipated. After all, section 28 is not a magic wand. It is the beginning of a process to provide adequate protection to cohabitants necessitated by an evolving society. The current situation provides an opportunity, as much as it does uncertainty, for potential claimants. It should be remembered the position of Scottish cohabitants is already much better than their equivalents in England and Wales, where no such ‘practicable and fair’ remedy exists. Therefore, the legislators should be slow to interfere unless it will improve the current law. Indeed, the lesson from Ireland is that devising a legislative scheme to provide protection for cohabitants is no easy task. What currently requires urgent attention is the need to increase public awareness of these rights for cohabitants, especially with the strict one-year time limit to bring a claim. This will also ensure the balance of liberty and protection is maintained by allowing those who wish to opt-out of section 28 to do so. Otherwise, the current law should be allowed to settle in, with a detailed examination of its progress in a few years’ time. It is hoped that any such future research will show that greater certainty, fairness and clarity in the law have all been achieved.

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186 Miles, Wasoff and Mordaunt (n 146) 319.
187 Gow (UKSC) (n 1).
188 ibid.
189 ibid [56] (Lady Hale).